IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

HERTZ EQUIPMENT RENTAL CORP., TRAVELERS PROPERTY CASUALTY CO. OF AMERICA, AND TRAVELERS INDEMNITY CO.,	)	
Respondents,	)	WD70191
vs.	)	Opinion Filed: August 4, 2009
AMMON PAINTING COMPANY, VALIANT INSURANCE COMPANY, AND ASSURANCE COMPANY OF AMERICA,	)	
Appellants.	)	

APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
The Honorable Jay A. Daugherty, Judge

Before Division Two: Victor C. Howard, Presiding Judge, Joseph M. Ellis, Judge, and Mark D. Pfeiffer, Judge

Ammon Painting Company (Ammon) and its insurers, Valiant Insurance Company (Valiant) and Assurance Company of America (Assurance), appeal the trial court's grant of summary judgment for Contractor Supply Company (CSC) (n/k/a Hertz Equipment Rental Corporation) and its insurers, Travelers Indemnity Company (Travelers Indemnity) and Travelers Property Casualty Company of America (Travelers Property), on the respondents' petition below. On appeal, they present seven points.

The underlying facts of the case are not in dispute. In April 1998, Ammon, a commercial power washing and painting company, entered into a rental agreement with CSC to rent an aerial lift. The rental agreement included an indemnification provision.

Ammon hired Michael Collom to power wash and paint a facility in Springfield. On May 6, 1998, while he was standing on the aerial lift, Collom came into contact with electrical lines and sustained severe personal injuries. He sued CSC for his injuries. At that time, CSC was insured under a primary insurance contract with Travelers Indemnity and insured under an excess liability insurance contract with Travelers Property. CSC settled with Collom for $3.5 million.

In 2007, CSC and its insurance companies filed a petition against Ammon, its primary insurance carrier, Valiant, and its excess insurance carrier, Assurance. In their petition, CSC and its insurance companies alleged that Ammon breached its indemnification agreement with CSC when it failed to indemnify CSC against Ammon's employee's claims. CSC and its insurance companies also sought a declaration that CSC was an insured under Ammon's insurance policies with Valiant and Assurance. In March 2008, CSC and its insurance companies filed a motion for summary judgment. The trial court sustained the motion on August 29, 2008. In its judgment, the trial court concluded that CSC was an insured under Ammon's insurance policies with Valiant and Assurance. It also concluded that Valiant was liable for $1 million of the settlement and Assurance was liable for the remaining $2.5 million. This appeal follows.

In their first three points, the appellants claim that the trial court erred in entering summary judgment for the respondents on their petition on the basis that CSC is entitled to indemnification under Ammon's insurance policies with Valiant or Assurance. In their first point, the appellants claim that the indemnification agreement between Ammon and CSC is

unenforceable because it is not conspicuous. In their second point, the appellants claim that, since the indemnification agreement is unenforceable, it cannot constitute an insured contract, which means that CSC is not entitled to coverage under Ammon's insurance policies with Valiant or Assurance. In their second point, the appellants also argue that CSC and its insurance companies could not maintain a direct action against Valiant and Assurance pursuant to the terms of the rental agreement (i.e. indemnification agreement) because Valiant and Assurance are not parties to the agreement and the corresponding indemnification provision contained within the agreement is unenforceable. Instead, the appellants argue that, to enforce its rights under the indemnification agreement, CSC should have obtained a judgment against Ammon and then filed a garnishment action against Valiant and Assurance.[1] In their third point, the appellants claim that, even if the indemnification agreement were enforceable and, thus, an insured contract under Ammon's insurance policies with Valiant or Assurance, the trial court still erred in entering summary judgment for the respondents in the amount of $3.5 million because the indemnification agreement limits Ammon's liability to $250,000.

Because the first three points address only one of the trial court's two alternative theories for concluding that CSC is entitled to coverage under Ammon's insurance contracts with Valiant and Assurance, the appellants have failed to carry their burden on appeal, and we must dismiss these points.

In their petition below, the respondents sought a declaration from the trial court that CSC is entitled to coverage under Ammon's insurance contracts with Valiant and Assurance. In support of its motion for summary judgment on the petition, the respondents alleged that CSC is

[1] Since we conclude that the indemnity agreement is enforceable and, therefore, qualifies as an "insured contract" under the terms of the Valiant and Assurance insurance policies, appellants' legal standing argument is moot. Further, appellants do not contest the legal standing of respondents to assert their coverage arguments in the court below as it relates to coverage under the "Who Is An Insured" section of the relevant policies.

entitled to coverage under Ammon's insurance policies because (1) its indemnification agreement with Ammon constitutes an "insured contract" covered by the policies issued by Valiant and Assurance or (2), ***in the alternative***, CSC qualifies as an insured under the "Who Is An Insured" section of the policies issued by Valiant and Assurance.

In its judgment, the trial court concluded that either alternative is sufficient, as a matter of law, to establish that CSC is entitled to indemnification under Ammon's insurance contracts, stating as follows:

> The [trial] Court further finds that the indemnity clause in the rental agreement constitutes an 'insured contract' that is covered by the insurance policies issued by Defendants Valiant Insurance Company ('Valiant') and Assurance Company of America ('Assurance'), and that the policies provided coverage for the full amount of Ammon Painting's liability to defend and indemnify set forth above.
>
> Alternatively, [CSC] also qualified as an insured under the policies issued by Valiant and Assurance for the claims alleged by the Collums against [CSC] in the Underlying Action, and no exclusion applies to those claims.

To successfully challenge the judgment on the issue of coverage, the appellants were required to present points on appeal challenging all of the trial court's grounds for finding that CSC is entitled to coverage under Ammon's insurance policies. *See, e.g., City of Peculiar v. Hunt Martin Materials, L.L.C.*, 274 S.W.3d 588, 590-91 (Mo. App. W.D. 2009); *Sieg v. Sieg*, 255 S.W.3d 20, 22 (Mo. App. W.D. 2008) (holding that appellant failed to carry his burden when he addressed only two of the circuit court's three grounds in its judgment). This is because, even if, for the sake of argument, the trial court erred in concluding that CSC is covered under Ammon's insurance policies on one basis, we would have no choice but to presume that, in the absence of contrary arguments, the trial court was correct to conclude that CSC is entitled to coverage under Ammon's insurance policies on the other basis. *Hunt Martin Materials*, 274 S.W.3d at 590-91.

The appellants, in their first three points, address only the trial court's first basis for finding that CSC is entitled to coverage under Ammon's insurance policies with Valiant and Assurance: that CSC's indemnification agreement with Ammon is an "insured contract," which entitles CSC to indemnification under Valiant's and Assurance's policies. The appellants make no argument that the trial court erred in concluding that CSC is entitled to coverage under Ammon's insurance policies because it qualifies as an insured under the "Who is an Insured" section of the insurance policies issued by Valiant and Assurance. Thus, by failing to assert that all of the trial court's conclusions of law for declaring coverage to exist are incorrect, the appellants have failed to carry their burden on appeal. *Id.* In fact, in their reply brief, the appellants concede that the trial court granted judgment for CSC on two alternative grounds and that they take issue with only one of the trial court's alternative grounds. In their reply brief, the appellants also concede that this is fatal to their arguments on the issue of coverage because they admit that CSC is an insured under the insurance policies issued by both Valiant and Assurance. Thus, the trial court did not err in entering summary judgment for the respondents on the coverage issue.

Of course, after deciding the issue of coverage, the trial court was required to allocate liability between the insurance companies. In its judgment, the trial court determined that Ammon's insurance carriers, Valiant and Assurance, are responsible to indemnify CSC and its insurers for the entire amount of the settlement. In that regard, some of the issues that the appellants present in the first three points do relate to the issue of the trial court's allocation of liability between the insurance companies. Thus, to the extent that the issues in the first three points relate to the trial court's allocation of liability, we will address those issues in points four through six, in which the appellants challenge the trial court's allocation of liability.

In their fourth point on appeal, the appellants claim that the trial court erred in apportioning liability to Ammon's insurance companies, Valiant and Assurance, because they allege that the unambiguous language in the insurance policies of Valiant and CSC's primary insurance carrier, Travelers Indemnity, required the trial court to allocate liability between Valiant and Travelers Indemnity first. Specifically, the appellants claim that the unambiguous language in Valiant's and Travelers Indemnity's "other insurance" provisions required the trial court to first allocate liability to Valiant and Travelers Indemnity in equal shares and only then, after CSC exhausted the limits of these primary policies, could it hold Ammon's excess carrier, Assurance, liable.[2]

In reviewing the grant of a summary judgment, we review *de novo*. *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993).

> The criteria on appeal for testing the propriety of summary judgment are no different from those which should be employed by the trial court to determine the propriety of sustaining the motion initially. The propriety of summary judgment is purely an issue of law. As the trial court's judgment is founded on the record submitted and the law, an appellate court need not defer to the trial court's order granting summary judgment.

Id. (citations omitted). Summary judgment will be upheld on appeal if: (1) there is no genuine dispute of material fact, and (2) the movant is entitled to judgment as a matter of law. *Id*. at 380.

> When considering appeals from summary judgments, the [c]ourt will review the record in the light most favorable to the party against whom judgment was entered. Facts set forth by affidavit or otherwise in support of a party's motion are taken as true unless contradicted by the non-moving party's response to the summary judgment motion. We accord the non-movant the benefit of all reasonable inferences from the record.

[2] For ease of interpretation, we itemize the parties and their relationship to allocation of liability as follows: Ammon (Indemnitor), Valiant (Indemnitor's primary liability insurance carrier), Assurance (Indemnitor's excess liability insurance carrier), CSC (Indemnitee), Travelers Indemnity (Indemnitee's primary liability insurance carrier), and Travelers Property (Indemnitee's excess liability insurance carrier).

Id. at 376 (citations omitted). We must affirm the trial court's summary judgment on any ground raised in the motion and supported by the summary judgment record. *Mo. Employers Mut. Ins. Co. v. Nichols*, 149 S.W.3d 617, 623 (Mo. App. W.D. 2004).

To be entitled to summary judgment, the movant must establish that: (1) there is no genuine dispute as to the material facts, and (2) based on those facts, he is entitled to judgment as a matter of law. Rule 74.04(c)(6); *Nichols*, 149 S.W.3d at 623. When the claimant moves for summary judgment, he must establish that there is no genuine dispute regarding the material facts upon which he would rely upon at trial, and he must show that these material facts establish each *prima facie* element of his claim. *Nichols*, 149 S.W.3d at 623.

In its judgment, after concluding that CSC (Indemnitee) is entitled to coverage under Ammon's (Indemnitor) insurance policies, the trial court apportioned liability between Valiant (Indemnitor's primary insurance carrier) and Assurance (Indemnitor's excess insurance carrier) and did not apportion any liability to CSC's insurance carriers, stating as follows in the judgment below:

> Consequently, whether under coverage for an 'insured contract' for Ammon Painting or under coverage to [CSC] as an insured under the policies, Defendant Valiant is liable to Plaintiffs for its policy limits of $1,000,000 dollars for the settlement plus attorney's fees and defense costs incurred in the Underlying Action, and Defendant Assurance is liable for the remaining $2,500,000 dollars of the settlement of the claims alleged against [CSC] in the Underlying Action.

When an insured seeks payment for its loss, he must seek payment from his primary insurance carrier first. *Planet Ins. Co. v. Ertz*, 920 S.W.2d 591, 593 (Mo. App. W.D. 1996). Once the insured exhausts the limits of his primary insurance carrier, he can seek payment from any excess insurance policy. *Id.* In this case, the trial court determined that CSC is an insured under both of Ammon's insurance contracts with Valiant (i.e. primary liability coverage) and

Assurance (i.e. excess liability coverage). CSC also possessed first party primary insurance coverage with Travelers Indemnity and first party excess liability insurance coverage with Travelers Property. Thus, pursuant to the underlying coverage declaration by the trial court, CSC is entitled to coverage under two primary liability insurance policies and two excess liability insurance policies.

When an insured has two primary liability insurance policies, the courts will often compare each of the policy's "other insurance" provisions to determine how liability should be allocated between each insurance company. *Id.* In this case, Ammon's (Indemnitor) insurance contract with its primary liability insurance carrier, Valiant, and CSC's (Indemnitee) insurance contract with its primary liability insurance carrier, Travelers Indemnity, have identical "other insurance" provisions, which state in pertinent part:

> 4. Other Insurance.
>
> If other valid and collectible insurance is available to the insured for a loss we cover . . . , our obligations are limited as follows:
>
> a. Primary Insurance
>
> This insurance is primary except when b. below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in c. below.
>
> . . . .
>
> c. Method of Sharing
>
> If all of the other insurance permits contribution by equal shares, we will follow this method also. Under this approach each insurer contributes equal amounts until it has paid its applicable limit of insurance or none of the loss remains, whichever comes first.

The parties agree that subsection (b) does not apply and so under the language of the "other insurance" provisions, subsection (c) would normally apply and Valiant and Travelers Indemnity

would be obligated to contribute towards CSC's loss in equal shares until each of them reached the limits of its policy or until they had paid the full amount of the loss. *See Ryder Truck Rental, Inc. v. U.S. Fid. & Guar. Co.*, 527 F. Supp. 666, 670 (E.D. Mo. 1981).

Missouri courts, however, recognize an exception to this general rule in cases where the insurance company that is trying to invoke the "other insurance" provision is liable to cover a party's claim because the company's insured promised to indemnify that party. *Fed. Ins. Co. v. Gulf Ins. Co.*, 162 S.W.3d 160, 164 (Mo. App. E.D. 2005). In *Gulf*, this court noted that the majority of jurisdictions have concluded that an insurance company that is liable to pay because its insured signed an indemnification agreement cannot use its "other insurance" provision to shift liability to the indemnitee's company:

> '[M]ost, if not all, jurisdictions to have faced the question of whether an indemnification agreement could relieve particular insurers of an obligation to pay, without resort to a separate action to enforce the indemnification agreement, have answered in the affirmative.' These cases give 'controlling effect to the indemnity obligation of one insured to the other insured over "other insurance" or similar clauses in the policies of the insurers, particularly where one of the policies covers the indemnity obligation.'
>
> The rationale for this exception is to give effect to the insureds' indemnity agreement. 'To hold otherwise would render the indemnity contract between the insureds completely ineffectual and would obviously not be a correct result, for it is the parties' rights and liabilities to each other which determine the insurance coverage; the insurance coverage does not define the parties' rights and liabilities one to the other.' To apply the 'other insurance' provisions to reduce the indemnitor's insurer's liability 'would serve to abrogate the indemnity agreement between' the indemnitor and indemnitee owner.
>
> . . . Courts should consider obligations under an indemnity agreement before allocating responsibility for the settlement liability according to the terms of the relevant policies.

Id. at 165 (citation omitted).

In this case, Ammon (Indemnitor) signed an indemnification agreement with CSC (Indemnitee), which states that Ammon would:

> [P]rotect, defend, indemnify, and hold [CSC] harmless from and against any claims, liability, personal injury, damage and expense in any manner connected with the Equipment, including its maintenance, use, storage, operation, transportation, or repair, and including personal injury to the operator of the Equipment.

If this agreement were valid and enforceable then, under *Gulf*, the trial court did not err in assigning liability to Ammon's primary liability carrier, Valiant, first without requiring CSC's primary liability carrier, Travelers Indemnity, to share the cost in equal shares. If, however, the agreement were unenforceable then, under the "other insurance" provisions in Ammon's contract with Valiant and CSC's contract with Travelers Indemnity, the trial court should have apportioned liability in equal shares to both primary carriers. Thus, the only issue for us to decide on this topic is whether or not Ammon's indemnification agreement with CSC is valid and enforceable.

In claiming that the indemnification agreement is unenforceable, the appellants make three arguments. First, they claim that the indemnification agreement is invalid because it is not conspicuous. They claim that the indemnification agreement is not conspicuous because CSC put it on the back side of the rental agreement in between fifteen other paragraphs. The appellants also point out that CSC highlighted other portions of the rental agreement (i.e. the disclaimer of warranty of merchantability and fitness provision) but failed to highlight the indemnification provision.

The appellants are correct that, although parties are free to contract as they wish, "contractual provisions releasing a party from liability for its own negligent acts must be stated clearly, unequivocally, and conspicuously." *Util. Serv. and Maint., Inc. v. Noranda Aluminum, Inc.*, 163 S.W.3d 910, 913 (Mo. banc 2005). The appellants, however, ignore the fact that, in *Utility Service & Maintenance, Inc. v. Noranda Aluminum, Inc.*, 163 S.W.3d 910, 913 (Mo. banc

2005), the Missouri Supreme Court relaxed these requirements for agreements between businesses of equal power and sophistication.

In *Noranda*, Noranda solicited a bid from Utility. *Id.* at 911. With its bid request, it sent a copy of Exhibit C, which included a provision requiring Utility to indemnify Noranda. *Id.* Noranda accepted Utility's bid request and issued a purchase order from Utility, which stated that Utility's acceptance "confirms [Utility's] acknowledgement of [Noranda's] standard terms and conditions." *Id.* Utility's president received a copy of Noranda's standard terms and conditions in September 1992 before Utility's work began under the contract. *Id.* The standard terms and conditions include Paragraph 19 of 23 total paragraphs, which stated that:

> Seller [Utility] shall indemnify and save Purchaser [Noranda] free and harmless from and against any and all claims, damages, liabilities or obligations of whatsoever kind, including, but not limited to, damage or destruction of property and injury or death of persons resulting from or connected with Seller's performance hereunder or any default by Seller or breach of its obligations hereunder.

Id. at 911-12.

After an accident, Utility's employee sued Noranda, and Noranda sought to enforce the indemnification agreement. *Id.* at 912. Utility and its insurance company argued that the indemnity provision could not be enforced because it was not conspicuous. *Id.* at 914. Utility argued that the indemnity provision was not conspicuous because it was not specifically identified as an indemnification provision. *Id.*

The Missouri Supreme Court noted that, as a general matter, indemnification agreements must be conspicuous. *Id.* The Missouri Supreme Court, however, also noted that it has relaxed this requirement when the parties are sophisticated business entities:

> The requirement that clauses providing indemnity for one's own negligence be conspicuous remains, particularly for contracts involving consumers. However, in a case such as this, where the parties are contracting for the performance of

> technical and dangerous work, and where both parties are sophisticated commercial entities, ***it is not required that the indemnity provision be set apart from the other contractual provisions or that it be labeled as an indemnity provision.***

Id. at 914-15 (emphasis added).

Based on this analysis, the Missouri Supreme Court held that Noranda's indemnification agreement was enforceable because, as between two sophisticated commercial entities, the indemnification language was clear and unambiguous and, therefore, conspicuous. *Id.* In support of this conclusion, the Missouri Supreme Court referred to its prior decision in *Purcell Tire & Rubber Co., Inc. v. Executive Beechcraft, Inc.*, 59 S.W.3d 505 (Mo. banc 2001).

In *Purcell*, the Missouri Supreme Court upheld a liability limiting agreement that stated: "'[i]t is expressly agreed that the liability, if any, of Executive Beechcraft, Inc. under this agreement shall be limited to the cost of services performed hereunder.'" *Purcell*, 59 S.W.3d at 509. The Supreme Court upheld the liability limiting agreement on the basis that it was clear, unmistakable, and conspicuous:

> Clear, unambiguous, unmistakable, and conspicuous limitations of negligence liability do not violate public policy. The contract "must effectively notify a party that he or she is releasing the other party from" its own negligence.
>
> . . . Sophisticated businesses that negotiate at arm's length may limit liability without specifically mentioning "negligence," "fault," or an equivalent. The liability limitation here does not violate public policy, because it is clear, unambiguous, unmistakable, and ***conspicuously located directly above the signature***.

Id. (citation omitted) (emphasis added).

As we noted above, however, in *Noranda*, the indemnification agreement was not located directly above the signature line. Instead, it was located in paragraph 19 of 23 paragraphs of a contract addendum that was incorporated by reference into the contract that the parties signed. *Noranda Aluminum, Inc.*, 163 S.W.3d at 914. Thus, we conclude that the logical extension of

the precedent of *Noranda* is that, in the case of two sophisticated business entities, an indemnification agreement is conspicuous when it contains clear and unmistakable language, regardless of its placement in the contract.

Like *Noranda*, the present factual scenario involves two sophisticated business entities that entered into an agreement that included an indemnification provision. Like *Noranda*, CSC did not specifically identify the provision as an indemnification agreement but included it in the standard terms and conditions. Pursuant to *Noranda*, CSC had no obligation to highlight or set the indemnification provision apart from the rest of the agreement. *Noranda Aluminum, Inc.*, 163 S.W.3d at 914. If anything, the CSC indemnification provision is more conspicuous than Noranda's indemnification provision since it was actually included in the agreement—albeit on the back side of the agreement—instead of being incorporated by reference into the contract. Furthermore, pursuant to *Noranda*, if the language of the indemnification provision uses clear and unmistakable language, it is deemed conspicuous and enforceable. *Id.* Since the wording of the CSC indemnification provision is very similar to the *Noranda* indemnification provision, we conclude that the language is clear, unambiguous, and unmistakable. Thus, we conclude that CSC's indemnification agreement is conspicuous and, thus, enforceable.

In the alternative, the appellants claim that, even if the provision were conspicuous, it must be read in conjunction with the next sentence in the agreement, which states that "Customer agrees to keep in force policies insuring Contractor against all such liability, cost and expense in limits not less than $250,000/$500,000 for injury to any one person and for any one accident and not less than $250,000 for damage or destruction to property." They contend that, by reading these two sentences in conjunction, the parties intended only to require Ammon to indemnify CSC by securing insurance for CSC in the sum of $250,000. Thus, in appellants' view, the

provision is not a full indemnification agreement. Rather, Ammon contends that it is an insurance provision that requires Ammon to indemnify CSC by securing insurance for CSC.

In making this argument, the appellants ignore the plain and ordinary language of the indemnification agreement. The agreement requires Ammon to indemnify CSC from "any claims in any manner connected with the Equipment[.]" The use of the term "any" in the indemnification provision is an indication that the parties intended full indemnification. *See id.; see also Knowles v. Moore*, 622 S.W.2d 803, 806 (Mo. App. S.D. 1981) (stating that "[t]he use of 'in any way' is a strong indication that the parties intended full indemnity"). Furthermore, contrary to the appellants' argument, nothing in the provision limits Ammon's liability to $250,000. The contract does indicate that Ammon must maintain insurance in an amount "not less than" $250,000. By using the phrase "not less than," this provision is nothing more than the ***minimum*** amount of insurance that Ammon was required to secure. While this contract language has not specifically been addressed by Missouri courts, other foreign jurisdictions have addressed the topic and concluded that the "minimum" insurance coverage requirement did not transform the contract from indemnity to insurance provision. *See Carrier, Jr. v. La. Pigment Co., L.P.*, 846 So.2d 803, 811 (3rd Cir. 2003); *Myers v. Burger King Corp.*, 638 So.2d 369, 381 (4th Circ. 1994); *Allianz Ins. Co. v. Lerner*, 296 F.Supp.2d 417, 422-23 (E.D. N.Y. 2003). Of significant importance is the fact that nothing in the contract prohibited Ammon from securing ***additional*** insurance for the purpose of fulfilling its indemnification obligations.

In making this ruling, we recognize that, as the appellants point out, this case is factually similar to *McAbee Construction Co. v. Georgia Kraft Co.*, 343 S.E.2d 513 (Ga. Ct. App. 1986), in which the Georgia Court of Appeals interpreted nearly identical contract language and ruled that the provision was an insurance provision and not an indemnification agreement. This case,

however, appears to be the minority position because, as we noted above, most foreign jurisdictions that have interpreted this language have concluded that the minimum insurance requirement does not transform the indemnification agreement into an insurance agreement. *See Carrier*, 846 So.2d at 811; *Myers*, 638 So.2d at 381; *Allianz*, 296 F.Supp.2d at 422-23. Thus, given the plain language of the indemnification provision and the weight of authority on the issue, we decline to follow *McAbee*, and we conclude that the provision in question does not limit Ammon's full indemnification obligation.

Finally, the appellants claim that CSC's indemnification provision is unenforceable because it runs counter to Missouri public policy. In making this argument, the appellants point out that the Missouri General Assembly has enacted section 434.100.1, RSMo 2000, which provides that "in any contract or agreement for public or private construction work, a party's covenant, promise or agreement to indemnify or hold harmless another person from that person's own negligence or wrongdoing is void as against public policy and wholly unenforceable." The appellants, however, concede that section 434.100.1 does not apply to its indemnification agreement because it was signed in April 1998 and, by its express terms, section 434.100 applies only to contracts entered into after August 28, 1999. § 434.100.4. The appellants argue, however, that we should infer that the General Assembly enacted this legislation because it determined that indemnification provisions in this setting were a problem in 1998, which would support an inference that all such indemnification provisions were void for public policy reasons in 1998.

In making this argument, however, the appellants point to nothing establishing that indemnification agreements were against public policy before August 28, 1999. And, to strike down this indemnification agreement, which was signed April 1998, would violate

section 434.100.4's command that section 434.100 applies only to contracts entered into after August 28, 1999. While indemnification agreements relating to public or private construction work signed after August 28, 1999, are void because they run counter to Missouri public policy, the appellants point to nothing that would make CSC's indemnification agreement void.

CSC's indemnification provision is clearly worded and plainly requires Ammon to indemnify CSC for any injuries relating from its use of the equipment. Both CSC and Ammon are sophisticated business entities. The indemnification provision is enforceable. Since CSC's indemnity provision is enforceable, the trial court correctly concluded that Ammon's (Indemnitor) primary liability insurance carrier, Valiant, cannot use its "other insurance" provision to compel CSC's (Indemnitee) primary insurance carrier, Travelers Indemnity, to split CSC's claim in equal shares. *Gulf*, 162 S.W.3d at 164. The trial court correctly ordered Ammon's primary carrier, Valiant, to exhaust its policy in its entirety by paying $1 million (i.e. the liability policy limit in the Valiant policy) to indemnify CSC for the first $1 million of the liability settlement. Accordingly, we conclude that the appellants' fourth point on appeal is without merit.

In their fifth and sixth points, the appellants claim that, even if the trial court were correct to apportion liability to Valiant (Indemnitor's primary liability carrier) first, it erred in apportioning liability to Assurance (Indemnitor's excess liability carrier) next because, under Ammon's insurance contract with Assurance, Assurance is an excess carrier. The appellants claim that, as an excess insurer, Assurance cannot be liable for CSC's loss until CSC exhausts both Ammon's policy limits from its primary carrier, Valiant, and CSC's own primary liability insurance carrier, Travelers Indemnity. Thus, the appellants argue that, while the trial court may have been correct that Valiant is required to exhaust its policy limits first, CSC's primary

insurance carrier, Travelers Indemnity, must go second. The appellants also argue that, once both primary insurance policies are exhausted, Assurance and CSC's excess carrier, Travelers Property, are required to share liability on a pro-rata basis.

As we noted in point four, an insured must normally seek payment from all of its primary insurance carriers first and exhaust those policies before it can seek payment from any excess insurance carriers. *Planet Ins. Co.*, 920 S.W.2d at 593. But, as we also noted in point four, the *Gulf* court held that "[c]ourts should consider obligations under an indemnity agreement ***before*** allocating responsibility for the settlement liability according to the terms of the relevant policies." *Gulf*, 162 S.W.3d at 165 (emphasis added). The appellants concede that the *Gulf* court made this holding. The appellants argue, however, that the *Gulf* court dealt with a situation where an excess insurance carrier attempted to use its "other insurance" provision to shift liability to another excess insurance carrier. The appellants claim that *Gulf's* holding should be limited to situations where the insurance carriers are on the same level—where both are primary or both are excess—and should not apply when one insurance carrier is a primary carrier and the other one is an excess carrier. They claim that *Gulf* does not override the general rule that an insured must seek payment from all of its primary carriers first and exhaust those policies before he can seek payment from any excess insurance carriers. *Planet Ins. Co.*, 920 S.W.2d at 593. Thus, the issue for us to decide is whether or not the rule in *Gulf* applies to this factual scenario (i.e. as between a primary and an excess liability insurer). If the *Gulf* rule applies, then the trial court was correct to require Ammon's excess insurance carrier, Assurance, to exhaust its policy before seeking payment from CSC's primary insurance carrier, Travelers Indemnity. If the *Gulf* rule does not apply, then the trial court should have required CSC's primary insurance carrier, Travelers Indemnity, to exhaust its policy before it required either Ammon's excess insurance

carrier, Assurance, or CSC's excess insurance carrier, Travelers Property, to reimburse CSC. For the reasons we discuss below, we believe that the rule announced in *Gulf* applies to disputes between any insurance carriers, regardless of whether or not they are on the same "level." The trial court did not err in allocating responsibility to Assurance (Indemnitor's excess liability carrier) after Valiant (Indemnitor's primary liability carrier) exhausted its policy limit.

The appellants are correct that *Gulf* dealt with a situation where both insurance carriers were excess carriers, and thus, they were on the same level. *Gulf*, 162 S.W.3d 162-63. The appellants, however, point to nothing in *Gulf* where the court expressly limited the rationale of its precedent to cases where the insurance carriers were on the same level. To the contrary, the *Gulf* court's language we cite above—that the "[c]ourts should consider obligations under an indemnity agreement before allocating responsibility for the settlement liability according to the terms of the relevant policies[ ]"—is extremely broad. *Id.* at 165. This broad language supports the conclusion that the reasoning of the *Gulf* precedent should not be limited to situations where the insurance companies are on the same level.

In support of the basis for its ruling, the *Gulf* court cited numerous foreign jurisdiction cases, and in some of these cases, the courts similarly concluded that, because of an indemnification agreement, an indemnitor's excess insurance carrier was liable on the claim ***before*** the indemnitee's primary carrier. For example, the *Gulf* court cited *Wal-Mart Stores, Inc. v. RLI Insurance Co.*, 292 F.3d 583 (8th Cir. 2002).

In *Wal-Mart*, a distributor signed an indemnification agreement with Wal-Mart. 292 F.3d at 585. The distributor was covered by a primary policy and an excess policy. *Id.* Wal-Mart also had a primary policy. *Id.* A customer purchased one of the distributor's products at a Wal-Mart store location, and it caused a fire, which severely injured the customer's child. *Id.*

The customer sued Wal-Mart, and Wal-Mart settled the case for $11 million. *Id.* The parties agreed that Wal-Mart was covered under the distributor's two insurance policies and that the distributor's primary insurance carrier was responsible for the first $1 million of the settlement. *Id.* at 585-86. Wal-Mart's primary insurance carrier and the distributor's excess carrier disagreed on which company was responsible for the remaining $10 million. *Id.*

On appeal, Wal-Mart and its primary insurance carrier cited numerous cases for the proposition that the indemnification agreement trumps "other insurance" provisions in the policies. *Id.* at 589. The excess insurance carrier argued that these cases did not apply because they were cases where the insurance carriers were on the same level and its case dealt with a situation where one insurance carrier was primary and the other insurance carrier was excess. *Id.* The Eighth Circuit Court of Appeals rejected the excess insurance carrier's argument and concluded that it was liable for the other $10 million. *Id*. In so doing, the court concluded that the labels "primary" and "excess" had no effect on Wal-Mart's indemnification agreement:

> We are unconvinced that an indemnitee loses its ability to have the effect of an indemnity contract considered in an insurance-allocation dispute because of how the insurers characterize themselves in the abstract. As we explained above, the labels "primary" and "excess" are shorthand for priority of payment obligations. In our case, we agree that [the excess insurance carrier] explicitly made itself "excess" to [the primary insurance carrier]. . . . We fail to see why [the excess insurance carrier] deserves the benefit of being "excess" to [Wal-Mart's primary insurance carrier], an insurer it knew nothing about.

Id. at 592.

The *Wal-Mart* court concluded that this rule upheld the benefit of each party's bargain. The court pointed out that, although the excess insurance carrier contended that it would be unfair to make it pay before Wal-Mart's primary insurer, the evidence established that the excess insurance carrier calculated its premiums relying only on the primary insurance of the distributor's insurance carrier. *Id.* at 592-93. The excess insurance carrier, however, had already

received the benefit of that bargain because the distributor's primary insurance carrier covered the first $1 million of the settlement. *Id.* at 593.

On the other hand, the court noted that Wal-Mart had specifically obtained the distributor's promise that it would indemnify Wal-Mart from any claims arising out of the use of its products. *Id.* To force Wal-Mart's primary insurance carrier to be liable before the distributor's excess insurance carrier would defeat Wal-Mart's purpose in negotiating the indemnification agreement. *Id.*

The court also noted that its holding would avoid circuitous litigation. *Id.* For example, if Wal-Mart's primary insurance carrier were forced to satisfy the settlement, it would most likely step into Wal-Mart's shoes and bring a subrogation action against the distributor in which it would assert Wal-Mart's contractual right to indemnification. *Id.* at 594. Once this occurred, the distributor would either be forced to indemnify Wal-Mart's primary carrier or it would force its insurance carrier to cover the claim. *Id.* To make the distributor liable, however, would prevent it from getting the benefit of its insurance policy with its insurer. *Id.* On the other hand, if the distributor were successful in getting its insurance carrier to cover the claim, the parties would be in the exact position they are now, which is that the excess insurance carrier is liable for the judgment. *Id.* Thus, in order to avoid circuitous litigation and give effect to the indemnification agreement, the court concluded that the distributor's excess insurance carrier was liable for the rest of the settlement. *Id.*

The decision in *Wal-Mart* has been followed by other courts and appears to be the majority rule in foreign jurisdictions. *See also St. Paul Fire & Marine Ins. Co. v. Am. Int'l Specialty Lines Ins. Co.*, 365 F.3d 263, 272, 278 (4th Cir. 2004) (based on the majority position announced in *Wal-Mart*, the court concludes that indemnitor's primary and excess insurance

carriers are liable for the settlement); *Am. Indem. Lloyds v. Travelers Prop. & Cas. Ins. Co.*, 335 F.3d 429, 436 (5th Cir. 2003) (a "clear majority" of courts recognize the principles announced in *Wal-Mart*.)[3]

Of course, in making this holding, we recognize that a few other courts have taken the contrary view. For example, in *Reliance National Indemnity Co. v. General Star Indemnity Co.*, 85 Cal. Rptr. 2d 627 (Cal. Ct. App. 1999), the court determined that an indemnitee's primary insurance carrier had to exhaust its policy before the indemnitor's excess insurance carrier. In justifying this holding, the court concluded that the contrary rule would alter the basic rules construing primary and excess policies:

> If we were to accept the arguments of [the indemnitee's primary insurance carrier], the basic rules construing primary and excess policies would be altered. A primary insurer would be allowed to charge a higher premium for insuring a greater risk; however, then the primary insurer would be allowed to shift the loss to an excess carrier which charged a lower premium. This is not a case between two primary carriers which have each received premiums for bearing the loss which ultimately occurred; rather, this is an action between an excess and a primary carrier. While the loss at issue must be borne by [the primary insurance carrier], it is nothing more than what is bargained for, particularly given the absence of any evidence that it calculated its premium with an understanding that an indemnity agreement would exist between its insured and [indemnitor].

Id. at 639; *see also JPI Westcoast Constr. L.P. v. RJS & Assocs., Inc.*, 68 Cal Rptr. 3d 91, 99-100 (Cal. Ct. App. 2007). Thus, while the *Wal-Mart* court focused on the fact that the indemnitor's excess insurer received the benefit of its bargain because the indemnitor's primary insurance carrier had already paid its liability policy limits, the *Reliance* court took the contrary rationale and pointed out that the indemnitee's primary insurance carrier had already received the benefit of its bargain because it was allowed to charge higher premiums for insuring a greater risk.

[3] *Gulf* also cited *St. Paul Fire & Marine Insurance Co. v. American International Specialty Lines Insurance Co.*, 365 F.3d 263 (4th Cir. 2004) and *American Indemnification Lloyds v. Travelers Property & Casualty Insurance*, 335 F.3d 429, 436 (5th Cir. 2003) favorably. *Federated Insurance Company v. Gulf Insurance Co.*, 162 S.W.3d 160, 164 (Mo. App. 2005).

The *Reliance* court is correct that the indemnitee's primary insurance carrier did receive the benefit of its bargain because it was allowed to charge higher premiums to insure a greater risk. The *Reliance* court's holding, however, ignores the other public policy rationales announced by the *Wal-Mart* court. Specifically, the *Reliance* court ignores the fact that the indemnitee bargained for an agreement with the indemnitor for him to indemnify the indemnitee. Furthermore, the *Reliance* court's rationale does not address the *Wal-Mart* court's concern over circuitous litigation. Thus, given the public policy rationales announced in *Wal-Mart*, the fact that the *Gulf* court cited *Wal-Mart* favorably, and the fact that the *Wal-Mart* court appears to represent the majority position, we conclude that, in a case where a person has agreed to indemnify another person, the indemnitee's primary insurance carrier is not required to exhaust its policy limits before either the indemnitor's primary insurance carrier or his excess insurance carrier is held liable for the loss.

The present case illustrates the rationale for today's holding. Like the excess insurer in *Wal-Mart*, Ammon's excess insurer, Assurance, set its premiums based on the assumption that Ammon already had primary insurance with Valiant. Assurance points to nothing in the record to establish that it set its premiums based on the assumption that two primary carriers would have to exhaust their policy limits before Assurance would be required to provide excess insurance coverage. Thus, since the trial court required Valiant to exhaust its policy limit before it held Assurance liable for CSC's remaining loss, Assurance received the benefit of its bargain with Ammon. And, like Wal-Mart, CSC signed an indemnification agreement with Ammon in which Ammon promised to indemnify it from liability from any claim arising out of the use of its equipment. To force CSC's primary insurance carrier, Travelers Indemnity, to assume liability before Ammon's excess insurance carrier, Assurance, would defeat CSC's purpose in

negotiating the indemnification agreement in the first place. Finally, our holding today avoids the circuitous litigation scenario outlined in *Wal-Mart*. *Wal-Mart*, 292 F.3d at 593.

The trial court did not err in concluding that, once Ammon's primary insurance carrier, Valiant, exhausted its primary liability policy limits, Ammon's excess insurance carrier, Assurance, was liable to exhaust its excess liability policy limits. Since the remaining $2.5 million of CSC's settlement does not exhaust Assurance's policy limits, we need not decide which insurance company would be required to pay next. Based upon the foregoing, we conclude that the appellants' fifth and sixth points on appeal are without merit. We affirm the trial court's judgment allocating payment between Valiant and Assurance.

In their seventh point, the appellants claim that the trial court erred in granting the respondents pre-judgment interest on their damages because they allege that the damages were not liquidated. Specifically, the appellants claim that the damages were not liquidated because there was a dispute regarding attorney's fees.

In Missouri, the award of interest in a judgment is governed by section 408.020, RSMo 2000, which states that:

> Creditors shall be allowed to receive interest at the rate of nine percent per annum, when no other rate is agreed upon, for all moneys after they become due and payable, on written contracts, and on accounts after they become due and demand of payment is made; for money recovered for the use of another, and retained without the owner's knowledge of the receipt, and for all other money due or to become due for the forbearance of payment whereof an express promise to pay interest has been made.

The appellants are correct that, to receive pre-judgment interest pursuant to section 408.020, the party's damages must be liquidated. *Lester E. Cox Med. Ctrs. v. Richards*, 252 S.W.3d 236, 242 (Mo. App. S.D. 2008). For purposes of prejudgment interest, damages are liquidated when the amount "becomes due and is 'fixed and determined or readily ascertainable by computation or a

recognized standard.'" *Columbia Mut. Ins. Co. v. Long*, 258 S.W.3d 469, 480 (Mo. App. W.D. 2008) (*quoting J.R. Waymire Co. v. Antares Corp.*, 975 S.W.2d 243, 248 (Mo. App. W.D. 1998)). Missouri courts prohibit pre-judgment interest on unliquidated claims based on the rationale that a person who is liable but does not know, or cannot find out the amount that he owes, should not be considered in default because of his failure to pay. *Id.*

In making their argument, however, the appellants ignore the trial court's judgment. In its judgment, the trial court did not award pre-judgment interest on the cost of attorney's fees. Rather, it awarded pre-judgment interest on the settlement amount:

> Defendants Valiant and Assurance also are liable *for prejudgment interest for the amount of the settlement at the statutory rate* from the date Plaintiffs' Petition was filed on February 8, 2007, in addition to post-judgment interest at the statutory rate for the amount of the judgment.
>
> The Court further finds, in light of the Stipulation of the Parties for Reasonableness and Appropriateness of Legal Fees and Expenses, that Plaintiff Travelers Indemnity incurred $62,500 of legal fees and expenses to defend Plaintiff HERC f/k/a [CSC] in the Underlying Action[.]. . . Therefore, *Defendants Ammon Painting and Valiant are liable for $62,500 of legal fees and expenses incurred by Plaintiff Travelers Indemnity to defend Plaintiff HERC f/k/a [CSC] in the Underlying Action* ***in addition to*** *post-judgment interest at the statutory rate.*

(Emphasis added.) Thus, it is clear that the trial court did not award pre-judgment interest on the respondents' attorney's fees.

In their reply brief, the appellants concede this point but next claim that the settlement amount was not liquidated because the parties disputed whether or not the appellants were obligated to reimburse the respondents for the settlement. This fact, however, does not make the settlement amount unliquidated. The mere fact that one party denies liability for damages does not mean that the amount of damages were not fixed or unascertainable. *Id.* In this case, the parties agreed that the settlement amount was $3.5 million. The only issue was whether or not

the appellants were liable to reimburse CSC for the amount. The damages were, therefore, liquidated. Based upon the foregoing, we conclude that the appellants' seventh point on appeal is without merit.

We, therefore, affirm the trial court's grant of summary judgment in favor of the respondents.

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MARK D. PFEIFFER, JUDGE

Victor C. Howard, Presiding Judge,
and Joseph M. Ellis, Judge, concur.